United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74 - 1938

MORRIS HALL, :

Appellant. :

----------x

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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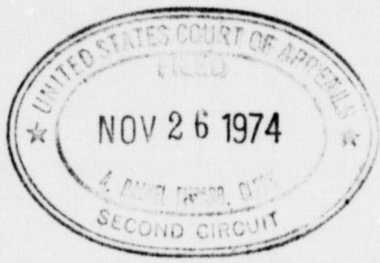

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

MORRIS HALL, :

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ISSUES PRESENTED

1. Whether the search and seizure of the gun was illegal, because the officers had neither probable cause to believe that appellant had a gun, nor a reasonable belief that they should fear for their safety.

2. Whether the failure of the officers to warn appellant, prior to taking his 'Stationhouse' statement, that anything he said could be used against him, violated his Fifth and Sixth Amendment rights and rendered the statement inadmissible.

3. Whether the Riker's Island interrogation of appellant, in a jail, while the instant case and a related state-court case were pending, and without attempting to contact his state-court attorneys or to promptly arraign appellant and appoint counsel on the instant case, violated appellant's rights under the Fifth and Sixth Amendments and under Massiah v. United States, 377 U.S. 201(1964).

4. Whether the identification testimony of Mrs. O'Rourke and Mrs. Morrison should have been suppressed, because the government's failure to produce or reconstruct the two January, 1973 photo spreads deprived the appellant of a fair hearing on the issue of possible taint. And,moreover, whether Mrs. Morrison should not have been allowed to make an in-court identification after the F.B.I. agents improperly reinforced her earlier selection of appellant's photograph.

5. Whether the Court, which was aware of appellant's prior confinement in a mental hospital as a psychotic, paranoid schizophrenic, erred in not ordering a psychiatric examination of appellant after it learned that appellant was being brought to trial each day from the psychiatric ward of Riker's Island Hospital and that he was not communicating with his attorney.

6. Whether the inference that the money-filled bag seen by Mrs. O'Rourke was the same bag as the empty "wadded up and torn" bag found by FBI Agent Ahlerich was impermissible because of the broken chain of identification and the different condition of the two bags.

7. Whether the totality of prosecutorial indiscretions merits a reversal of the judgment herein.

8. Whether the Court erred in denying appellant's motion for a mistrial when, while at lunch during deliberations, several jurors heard a man yell at them, 'Show no mercy'.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Stewart, J.), rendered July 3, 1974, convicting appellant after trial by jury of the crime of bank robbery [18 U.S.C. §2113(a)], and sentencing him to fifteen (15) years imprisonment.

Timely notice of appeal was filed and this Court, on July 16, 1974, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently serving the sentence pursuant to the judgment herein.*

B. Statement of Facts

On January 25, 1973, a Manhattan branch of the Security National Bank was robbed by a lone, black gunman who also seized the bank guard's gun. No weapons were discharged and no one was injured.

The bank surveillance camera had been in operation at the time of the robbery, but because of an error by one of the bank employees in the course of removing the film from the camera, the entire reel of film

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* As of November 14, 1974, appellant was being held in the hospital ward at Rikers Island. He has a number of state cases pending.

Q They told you that No.6 was the person who robbed the bank?

was accidentally exposed and there was thus no photographic evidence of the robbery and no photographs of the robber.

Some of the stolen money and a torn paper bag were recovered outside the bank, but the robber made a successful getaway.

(1) The Arrest of Morris Hall (Seizure of the Gun)

On April 13, 1973, some three months after the bank robbery, New York City Patrolman Maurice Vosges arrested Morris Hall, the appellant herein, for possession of a gun. At 12:50 p.m. on that date, Officer Vosges was in a luncheonette at 261 West 125th Street, together with Officers Stephen and D'Alba.

Vosges' complete direct testimony as to the seizure of the gun was a follows:

> A A gentleman came into the restaurant and informed me that there was a gentleman behind us who was armed with a gun.
>
> Q Did he tell you anything else?
>
> A Also that the man was bothering him.
>
> Q What was the name of that individual?
>
> A I believe his name was Dancey.
>
> Q What did you do thereafter?
>
> A I informed Officer Stephen. He in turn, informed Detective D'Alba.
>
> Q What, if anything, happened thereafter?
>
> A Detective D'Alba and myself left the counter and approached the gentleman.
>
> Q And what, if anything, did you do when you reached the gentleman?
>
> A I asked him for identification. I also

asked him did he have a gun.

Q What did he say?

A He didn't answer me.

Q What did you do thereafter?

A I noticed a bulge in front of his coat.

Q What if anything happened thereafter?

A Detective D'Alba reached for his left arm and I reached for his right and I felt the bulge.

Q What happened thereafter?

A I opened his jacket and retracted a pistol from his waistband.

Q And thereafter?

A He was placed under arrest.

(H. 66-67)*

Under cross-examination, Vosges acknowledged that only a week earlier, at the state-court suppression hearing (in connection with the state charge against appellant for possession of the gun), Vosges had not mentioned seeing any bulge (H.71), and he then admitted that:

> If I didn't make a statement that I saw it, I guess I didn't see it.
>
> (H.72, emphasis added)

The Court attempted to resolve the question of whether Vosges ever really saw a bulge:

---

* "H" refers to minutes of the hearing on the motion to suppress, January 25 and 28, 1974.

statement?

> Upon feeling a bulge at the defendant's waistband, Detective Vosges opened the defendant's coat and removed [a gun] from his waistband.
>
> Memorandum Opinion on Suppression Hearing, p.7.*

The Court noted that:

> There was a good deal of conflicting testimony at the hearing concerning whether or not Officer Vosges saw a bulge at the defendant's waistband prior to feeling the bulge. The testimony in its totality and simple logic compel the conclusion that the pat down occurred so rapidly that the viewing and feeling of the bulge at the defendant's waistband must have occurred simultaneously.
>
> Id., note 6.

It was clear that Dancey has never given Vosges any factual basis for his claim that appellant had a gun:

> Q Dancey didn't tell you how he knew that guy behind him had a gun, did he?
>
> A I don't believe he did, no.
>
> (H. 96)

The Court specifically found that:

> Arthur Dancey was not a paid government informant. There is no indication that the New York City Police had any prior dealings with Mr. Dancy.
>
> Memorandum Opinion on Suppression Hearing, p.6, n.4.

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* The Court's entire memorandum opinion on the suppression hearing is reproduced in Appellant's Appendix as Item C.

a shave with clippers now; complains of no mirrors."

Despite the fact that a week earlier, at the state-court suppression hearing, Vosges never mentioned asking appellant for identification, he testified in the district court that he had asked for identification (H. 73-74, 85).

Vosges claimed that 15-20 seconds passed between the time he asked appellant if had a gun and the time the officers grabbed appellant's arms (H.97). Prior to the opening of his coat and the seizure of the gun, appellant had his arms pinned by two officers, one at either side. He never had his hands in his pockets and had never attempted to flee (id.).

Appellant Morris Hall testified that:

> Officer Vosges, two other officers all in civilian clothes accosted me and grabbed my arms and they said that they had been informed that I have a gun and they began patting me down, opening up my jacket and they removed a gun from my waistband.
>
> Q Did Officer Vosges ask you for identification?
>
> A No, he didn't.
>
> Q Did Officer Vosges ask you if you had a gun or did he just say he had been informed you had a gun?
>
> A He said that "We've been informed that you have a gun," and he grabbed my waistband and patted me down.

(H.213)

Appellant's motion to suppress the gun was denied. (See, Memorandum Opinion, supra, Item C in Appellant's Appendix, at pp. 8-9).

(2) The 'Stationhouse' Statement

On April 13, 1973, after arresting appellant for possession of the gun, the New York City Police officers took him to the stationhouse. There, according to Officer Vosges (who was the only officer produced at the hearing), appellant was given the following 'advice' by Patrolman Stephen:

> Q What rights was the defendant advised of?
>
> A He was advised of the right to remain silent before any questions were given to him by the police department without an attorney, if he couldn't afford an attorney one would be provided for him.
>
> (H.68)*

In an effort to ascertain if anyone ever advised appellant that what he said could be used against him, defense counsel repeatedly reviewed this question on cross-examination, and Officer Vosges agreed that the rights he had testified to on direct were "all the rights" given appellant (H.74), "no more and no less" than what was given appellant, "the length and breadth of what he was advised" (H.75).

Significantly, one week earlier, at the state-court suppression hearing, Vosges also failed to testify that appellant had ever been advised that anything he said could be used against him:

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* This is all the 'advice' Vosges ever testified to on direct examination.

Q What to your knowledge did Patrolman Stephen tell the defendant at the stationhouse in reference to what I have called informing the defendant of his rights?

A He has a right to remian silent, he had the right to an attorney before he answered questions, any questions by the police department, if he could not afford an attorney one would be appointed for him.

(Minutes of People v. Morris Hall, Indictment No. 2049/73, Supreme Court, New York County, January 17, 1974, p.8)

On redirect examination, in a transparent attempt to supply the missing rights advice to Officer Vosges, the Assistant United States Attorney, over objection, read from an F.B.I. advice-of-rights form, effectively leading Officer Vosges into the desired, crucial response:

Q Did that statement state: "You have the right to remain silent."?

MR. BERMAN: Objection, you Honor. I believe he is reading from an FBI form.

THE COURT: No, it doesn't make any difference what he is reading from. He is just asking him.

(H.99)

* * *

Q And did it state "Anything you say can be used against you in court"?

A Yes.

* * *

MR. BERMAN: I object to all of this as leading, your Honor.

THE COURT: Overruled.

(H.100)

After 'advising' appellant, Officer Stephen asked where he got the gun. According to Vosges' direct testimony, appellant said "that he had bought it ror $50" (H.69). According to Vosges' testimony on cross-examination, appellant said, "I bought the gun for $50 in the street" (H.79). When Vosges was confronted with the Police Department Arrest Report, in which appellant was quoted as having said "I just brought the gun" (H.89), and when defense counsel asked Vosges if the Arrest Report's quote was "an exact quote of what Mr. Hall said", Vosges replied, "I would think it is, yes" (H.90).

(3) Appellant's Education and Psychiatric History

Appellant's education went only as far as the ninth grade (H.212).

Both at the hearing and at the trial, the Court received in evidence a Clinical Summary report on appellant from the Matteawan State Hospital for the Criminally Insane, covering his stay there from December 10, 1971, through February 8, 1972.* The report discloses that appellant dropped out of school because he was failing(M.1).

The Matteawan report reveals that appellant had "shown progressive deterioration of his ..... mental condition... to the point where he is psychotic ...."

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* A copy of the Matteawan Clinical Summary, hereinafter referred to as "M", is reproduced in Appellant's Appendix as Item E.

The diagnosis is listed as "Paranoid Schizophrenia" (M.1).

The report of the examining physician includes the entry, "shows extremely poor judgment" (M.2). Under "Mental Symptom Complex" we find the entry, "He finds difficulty in coping with the environment" (id.). Under "Differential Diagnosis": "Shows paranoid ideation" (id.).

The diagnosis is given as "Unspecified Psychosis and ...Personality Disorder, Antisocial" (id.).

On February 8, 1972, Matteawan apparently found that appellant had sufficiently recovered from the recent "Psychotic Episode." The "Final Diagnosis" was unchanged: "Unspecified Psychosis and ...Personality Disorder, Antisocial." (M.3).

Appellant moved to suppress the stationhouse statement, arguing, inter alia, that it was the fruit of the illegal seizure of the gun, that the crucial Miranda warning had not been given, and that appellant lacked the mental capacity to intelligently waive his rights. The motion was denied (Memorandum Opinion, supra, pp.10-11).

(4) The Initiation of the Federal Prosecution

The gun seized by the New York City Police officer from appellant on April 13, 1973, was quickly identified as the same gun which the robber had taken from the bank guard on January 25, 1973, during the course of the instant bank robbery. This fact was relayed to the

F.B.I., and on May 1, 1973, a complaint was filed in the Southern District of New York, charging appellant with the instant bank robbery. That complaint, sworn to by F.B.I. Agent James Murphy, before Magistrate Jacobs, cites as some of the bases for the charge:

> (2) Fingerprint identification of the accused from evidence left at the scene of the crime.
>
> (3) Possession by the accused of a firearm used in the commission of the crime.
>
> (4) Identification of the accused from a photographic spread by an eyewitness to the crime.

On May 1, 1973, Magistrate Jacobs issued a warrant for the arrest of appellant pursuant to that complaint.

Appellant was never arraigned on the complaint.*

(5) The 'Rikers Island' Statement

On May 31, 1973, while he was incarcerated at the New York City Correctional Institute on Rikers Island pursuant to pending state-court charges**, appellant was interrogated by F.B.I. Agents Murphy (supra) and Cotton about the instant bank robbery.

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* He was ultimately indicted, on August 17, 1973, for this bank robbery, and was not arraigned on the indictment until September 17, 1973.

** The Federal warrant, issued to Agent Murphy on May 1, 1973, had apparently already been lodged with Rikers Island as a Federal detainer against appellant. Minutes of 2/15/74, p.189.

It was stipulated at the suppression hearing that at the time appellant was questioned by the F.B.I. on May 31, 1973, he had three pending state-court cases, one of which was for possession of the bank guard's gun (the April 17, 1973, arrest), and that he had been assigned counsel on each of these cases (H.200-204).

Agent Murphy testified that at the time he questioned appellant in Rikers Island on May 31, he knew about the pending state-court gun case. He also knew about a pending state-court attempted murder case against appellant. He made no attempt to locate or contact the appellant's lawyers on those pending cases (H.119-120).

Murphy conceded that on May 31, 1973, there was no urgency to see appellant which might have prevented Murphy from contacting appellant's lawyers (H.120).

On May 31, 1973, appellant was the F.B.I.'s only suspect in the instant case (H.131). They already had his fingerprints on the bag found outside the bank (H.149). They already had an eyewitness who had identified him (Id.). They already knew he had been caught with the bank guard's gun. They also knew that this same gun was the subject of his pending state-court case (H.125,160).

When Murphy interviewed appellant, it was Murphy who first brought up the subject of the gun:

> I asked if a bank guard's gun was obtained. He said, 'Yes.'
>
> (H. 148)

Appellant signed a waiver-of-rights form, and on that form, below the waiver portion, Agent Murphy wrote out a 2 1/2-page statement in the first person, purportedly a summary of what appellant told the agents. This statement included the following:

> On April 13, 1973, I was arrested by the New York City Police for possessing a loaded gun. This gun was the gun I took from the bank guard during the robbery.

Appellant moved to suppress the Rikers Island statement, arguing that (1) because of his mental condition, his signed 'waiver' could not have been a knowing and intelligent waiver, and that (2) the jailhouse questioning of appellant, while this case and other cases were pending, and without any attempt to contact his other attorneys or to promptly arraign him and appoint counsel on the instant case, violated the rule of Massiah v. United States, 377 U.S. 201(1964).* The motion was denied (Memorandum Opinion, supra, pp. 12-14).

The Court later noted that:

> What it comes down to is if he had been arraigned [on the complaint] when he should have been, he would have had counsel, or at least would have had the right to have counsel when he was interviewed on May 31st.....
>
> (Minutes of 3/18/74, p.7)

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* Counsel also called the Court's attention to Rules 4, 5, 5.1, and 46(g) of the Federal Rules of Criminal Procedure and to this Court's Speedy Trial Rules. Minutes of March 18, 1974, pp.3-11.

(6) The Eye-Witness Identifications

A pre-trial identification hearing, pursuant to Simmons v. United States, 390 U.S. 377 (1968), was held with respect to two potential eye-witnesses, Flora O'Rourke and Charles Sullivan, who had previously been shown photo spreads. A third witness, Ouida Morrison, was not produced by the government at the pre-trial hearing, and a Simmons hearing as to Mrs. Morrison was held during the trial, out of the presence of the jury.

Flora O'Rourke, the bank's head teller, testified at the hearing that on January 25, 1973, the date of the bank robbery, New York City Police officers showed her "hundreds" of photos. She failed to make any identification from among those photos. It is not known whether appellant's photo was among those spreads; the government, who called Mrs. O'Rourke as its witness, took the position that it was unable to reconstruct or to determine the contents of the January 25, 1973, photo spreads.

Six days later, on January 31, 1973, F.B.I. agents showed Mrs. O'Rourke an F.B.I. booklet containing 25-30 photos. She picked out one man (Exhibit 8-C). This man, whom she identified as the bank robber, was not appellant. The government was unable to produce the January 31 booklet and, again, it is not known whether appellant's photo was among those in the booklet.

Then, on April 27, 1973, Mrs. O'Rourke was

shown seven photos, received in evidence at the hearing as Exhibits 1 through 7.* Appellant's photo was among those, as No.6. In court, at the hearing, Mrs. O'Rourke said that on April 27, 1973, she had chosen No.3(H.35). On redirect, she again stated that she had chosen No.3, but later claimed that she had picked No. 3 as her first choice and No.6 as her second choice (H.36).

Appellant argued that Mrs. O'Rourke should not be permitted to make an in-court identification at trial, because she had previously identified two persons other than appellant (8-C and 3), and because the government's failure to produce the January 25 and January 31, 1973, photo spreads and its failure to keep any record of whether or not appellant's photo had been included among those spreads, deprived appellant of potentially exculpatory evidence and deprived him of the factual basis upon which he might have been able to prove that factors present in the various January, 1973, photo spreads might have subconsciously enhanced Mrs. O'Rourke's willingness to accept one or more of the choices in the April, 1973, photo spread or her willingness to make an identification at the trial.

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* At the trial, these same seven photos, with mug-shot numbers, etc. removed, were received in evidence as Exhibits 1A through 7A.

The Court, noting that "Mrs. O'Rourke's rather indecisive identifications .... may reflect on the credibility of any in-court identification she would make," and specifically recognizing possible Brady questions, denied the motion to suppress Mrs. O'Rourke's identification testimony. Memornadum Opinion, supra, p.5.

Ouida Morrison, a bank teller at the time of the bank robbery, testified at her in-trial Simmons hearing that on January 25, 1973 (the date of the bank robbery), she was shown "quite a few" photos, and that on January 31, 1973, F.B.I. agents showed her a 25-photo booklet.* (T.61)** She chose 8-C (the same individual chosen by Mrs. O'Rourke) from among the photos in the booklet, she placed her initials and the date on the back of 8-C, and she told the agents:

> This is the same Negro male who robbed the bank.
>
> (T.65)

On April 27, 1973, Mrs. Morrison was shown the 7-photo spread (Exhibits 1 through 7). She picked out No.6 (appellant). The F.B.I. agents immediately reinforced that choice:

> Q Has anybody told you about whether or not No.6 is the person who robbed the bank?
>
> A I think so.
>
> Q Who was that?
>
> A The FBI.

---

* This booklet was never produced in court.

** "T" refers to minutes of trial, February 13, 14, 15, 19, 20 and 21, 1974.

I went in and saw the [illegible]

Q They told you that No.6 was the person who robbed the bank?

A Well, not -- I wouldn't say, you know, yes, they said, yes, that is the one I picked out according to the picture but --

Q What is your best recollection of what they said, not their exact words, but what you can remember?

A I could see by the way they looked when I pointed the picture out.

(T. 67-68)

The Court noted that:

> The agents may have indicated tacit pleasure at Mrs. Morrison's April identification, but such identification clearly came after Mrs. Morrison made that identification.
>
> Memorandum Opinion, supra, p.3.

Thus, the Court reasoned that the April 27 'tacitly-indicated' approval could not have tainted the April 27 identification, but the Court failed to deal with the obvious fact that this tacit approval would necessarily taint Mrs. Morrison's later, in-court identification of appellant.

Charles Sullivan, the bank guard, was unable to recall any of the photo spreads which had been shown to him or the method in which they had been presented.

The Court noted that:

> As between the parties, the government has the only access to the information we seek. ... The government chose not to avail themselves of this opportunity.
>
> Memorandum Opinion, supra, p.6.

The Court granted appellant's motion to prevent Mr. Sullivan from making any in-court identification.

(7) Appellant's Competence to Stand Trial

Prior to trial, appellant's counsel had never questioned his client's competence to stand trial.* But on the first day of trial, appellant's counsel learned that appellant had only recently been transferred to the psychiatric ward at Riker's Island Hospital. Appellant's counsel immediately informed the Court:

> I have a few other problems. Apparently Monday night Mr. Hall was transferred to the psychiatric ward at Riker's. I feel that since I have learned that today... the Court ought to know that for what it is worth.
>
> (T.33)

No further inquiry into this matter was made by the Court at that time.

On the third day of trial, the following colloquy took place out of the presence of the jury:

> THE COURT: Are you prepared to go ahead, Mr. Berman?
>
> MR. BERMAN: No, you Honor. I have no personal knowledge of what happened down at Riker's this morning, or last night, or whenever, or what happened downstairs in the marshal's pen here in the courthouse today. I have asked Mr. Hall what happened, and he won't tell me what happened.
>
> At this point in time, Mr. Hall is no longer communicating with me at all.

---

* Appellant's trial counsel was not appointed until January 18, 1974, merely one week before the suppression hearings.

THE COURT: I want to be clear about this.

THE COURT: Mr. Hall, do you care to make a statement?

DEFENDANT HALL: No. I don't.

THE COURT: Are you prepared to go ahead with the trial?

Did you hear my question, Mr. Hall?

DEFENDANT HALL: Your Honor, I said I wasn't prepared to make any kind of statement.

MR. BERMAN: Your Honor, to amplify the record, Mr. Hall is now handcuffed with his hands behind his back and has leg irons or leg handcuffs with a chain between them on his ankles. His belt has been removed. The button on his pants is open. His shirt is, all the buttons are unbuttoned, his collar is up and his shirt is out of his pants and he has a generally unkempt appearance, I suppose that's fair to say.

Under the circumstances, since Mr. Hall is not talking to me at all, I wouldn't want the jury to get the impression that he is talking to me, or that we are consulting or anything that isn't really true. He is just not talking to me.

And if I am directed to continue in this matter I prefer not to be seated so close to Mr. Hall as to give the impression that he is communicating with me and that what I do is in some way at his direction or with his agreement because it couldn't be, he is just not talking to me any more.

I again don't know what happened in Riker's. I don't know why he is here in handcuffs today, and asked by the Court am I prepared to proceed the answer has to be no.

I would like to know if anybody knows what happened.

THE COURT: I can read and I will read into the record a statement which reads as follows. This is headed, "The City of New York Medical Division, Department of Correct, Consultation Request."

It says, "To Court."

To me, I take it.

Dated today, Februrary 15, 1974. And then the following appears in handwriting.

"This man -- who I take it is, oh, yes, it is indicated at the bottom of the page under name of patient, Morris Hall -- "This man is

police informant, nor had he had any prior dealings

refusing to go to court because he cannot get a shave with clippers now; complains of no mirrors."

And then it says, "MS on admission."

I don't know what MS means. Does anybody know what that means?

MS may indicate, but I am guessing, medical survey or something of that nature.

"MS on admission -- alert oriented, articulate. Calm. coherent, no thought disorder. No change in his condition today. No psychosis. Defiant inmate. Okay to go to court psychiatrically."

It is signed, I believe it is C. I can't be sure of the middle initial, maybe F, Spalding, referring physician.

(T. 170-173)

* * * *

MR. BERMAN: ...[T] he sort of bizarre circumstance here is that Mr. Hall is held in the psychiatric ward at Riker's Island Hospital, but some doctor out there from the Department of Corrections knows that Mr. Hall is okay to go to court.

I don't know why he is held in the psychiatric ward of the hospital, and if there is a valid reason for that then I don't know how he is okay to go to court.

THE COURT: I don't know from this he is held in the psychiatric ward.

MR: BERMAN: That is my understanding either from the marshals or our inquiry yesterday.

THE COURT: At the bottom of this it indicates under the printed heading "Correction Department Institution," it is written in "Third Floor RI Hospital," which I take it means Riker's Island Hospital.

I would like to have this marked as Court's Exhibit No. 2, I guess it is.

(T. 173-174)

* * * *

MR. BERMAN: You will recall that the suppression hearings in this case were held on January 25th and 28th, and during the course of the suppression hearings I subpoenaed some material from Matteawan State Hospital which did not arrive until, I

believe, Tuesday the 29th of January, or perhaps Wednesday, the 30th of January, and that I immediately sent the Matteawan material to the Court and sent a copy to Mr. Schatten.

In that Matteawan material Mr. Hall, his final diagnosis, personality disorder, anti-social, recovered from psychotic episode.

So back in 1971, '72, when he was in Matteawan Hospital, the final diagnosis was psychosis, but recovered from a specific psychotic episode.

In preparation for the pretrial hearings I conferred with Mr. Hall, and I thought his mind was clear, and he was able to communicate with me, and although he never specifically discussed matters relating to the date of the offense here he was able to discuss with me potential defense tactics and in my opinion he [was] therefore, competent to understand what was going on at trial and I had no qualms about that at the suppression hearing and didn't raise any question as to his present competency to stand trial.

I just submitted the Matteawan material for as much as it bears on the question of his competency to sign a waiver of constitutional rights back in May of 1973, and I submitted it for that purpose and of course the Court was free to draw any inferences it chose.

Mr. Hall, I think, gave no apparent signs of any particular mental problem during the suppression hearings. At least I saw none.

(T. 174-175)

* * * *

However, as I understand it, sometime on the night of the 11th, while he was being held in the Tombs, some altercation developed, I don't know anything about the personality and I know know very little about that from Mr. Hall, but based would be what happened in the Tombs on the night of the 11th he was transferred as I understand to the psychiatric ward of Riker's Island Hospital, on this Monday, the 11th, Riker's released him to State Supreme Court where he had a calendar appearance and the marshals brought hime here from there.

So I don't know what inferences the Court chooses to draw from the fact that on the eve of trial, though not on the eve of the original trial date, but when that date was cancelled or postponed some incident happened and Mr.

Hall wound up in a psychiatric ward

He was here for the first day of trial, which was the afternoon of Wednesday, he was here yesterday, and each night he has been going back to the psychiatric ward at Riker's, and I stated that on the record at the first date of trial.

Today we understand for some reason or other he is being held as I described him, and he will not communicate with me.

Now, I don't know whether this is a question of competence to stand trial, whether this is a question of there is just no communication between him and me, but given his appearance, which is terribly suggestive to the jury, and secondly the fact that he doesn't communicate with me, and third, not simply the Matteawan records but the fact that he is a person who has had a history of psychosis with psychotic episodes he has recovered from I now have to the Court to inquire into the question as to whether what happened either Monday at the Tombs or whatever has happened this morning might not evidence some sort of recurrence of his psychotic condition.

I don't know, I am not competent to testify as to that, neither as to expertise or as to the facts. I just know he is a person who had a prior psychotic episode and apparently recovered, and now he is brought into court in this condition from a psychiatric ward in Riker's, as I understand it, and if I am wrong I will stand corrected.

(T. 176-178)

* * * *

THE COURT: It seems to me that we should go ahead with the trial. You have had, of course, Mr. Berman, an opportunity to communicate with Mr. Hall. As far as I can see, you are fully prepared. The doctor's report that I have just read into the record indicates that he was concerned this morning because he didn't get the shaving facilities he wanted. As Mr. Hall knows, we have made facilities available to him here in the courtroom.

Mr. Hall's behavior in the courtroom Wednesday and yesterday was perfectly proper. On the basis of what I have available to me, the Matteawan report and the report of Dr.

> Spalding, I don't at the moment have any reason to beleive that he is not competent to continue with the trial.
>
> However, I don't want to proceed with the trial the way things stand at the moment. Mr. Hall, I am addressing these remarks particularly to you. I assume on the basis of your behavior to date in court that you will continue to respect the dignity of the courtroom. I have no reason to think that you won't.
>
> (T. 178-179)

The Court then warned appellant of the coercive measures it could resort to, under Illinois v. Allen, 397 U.S. 337 (1970), if appellant became disruptive, concluding that:

> What I propose to do right now, therefore, Mr. Hall, is to give you a few minutes to compose yourself, to fix up your clothing, and to have some marshals remove the handcuffs and whatever other restraints are now presently binding you. But I caution you that I am prepared to adopt any of these alternatives if your conduct requires it.
>
> (T. 180)

Appellant's counsel then stated his position:

> As long as I am proceeding as counsel for Mr. Hall at the Court's direction I will make whatever objections I consider necessary and I will proceed to examine witnesses, and so on, but I want it clear that I think that under the circumstances a Court appointed physician -- that is, a psychiatrist -- should examine Mr. Hall, and we should not rely on that somewhat unclear one-page handwritten document from a doctor in Riker's, because it is Riker's Hospital keeping him as I understand in a psychiatric ward, and I don't understand how they can keep him in a psychiatric ward and some physician at Riker's can say the man is psychiatrically fit for court.
>
> (T. 180-181)

* * * *

> ... I want it clear that having objected to proceeding because I think Mr. Hall should be examined by an independent Court appointed psychiatrist on the question of his present state of mind, I take exception to that one-page document from Riker's, that this proceeding continues over my objection.
>
> (T. 190-191)

(8) The Trial

In reviewing the ground rules for the trial, the Court cautioned the government that no reference should be made (by the prosecution or by any prosecution witnesses) to any of appellant's pending state-court cases (T.11)*. The Court also ruled that Riker's Island, a City institution, should not be referred to by its name, and should instead be referred to only as "a jail" by the agent who was to testify to appellant's May 31, 1973, 'Riker's Island' statement (T.15).

Flora O'Rourke, the government's first witness, identified appellant (who was sitting in the first row of the courtroom, next to four black marshals) as the man who "looked the most like" the bank robber (T.104, 142, emphasis added).

She acknowledged that she had previously (on January 31, 1973) identified 8-C as the person who

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* The April 13, 1973, arrest had resulted in state-court charges of possession of a loaded gun and menacing.

"looked just like the person who robbed me" (T.119, emphasis added). She had initialed the back of Exhibit 8-C (T.113). On the date of the robbery, she told the F.B.I. that the robber was 5' 10" tall (T.125). Appellant is 6' 1".

During the course of the robbery, the robber handed her a brown paper bag which she filled with money and she then handed it back to the robber (T.102).

After the robbery was over, while detectives and fingerprint men were on the scene, some workingmen around the corner came running into the bank, carrying a brown paper bag (T.104). The bag, which was placed on Mrs. O'Rourke's counter, contained some of the hold-up money (T.105-109).

F.B.I. Agent Thomas Cotton testified that on January 31, 1973, he showed a booklet containing approximately 25 photos (the then-current F.B.I. black 'unknown subjects' album) to Mrs. O'Rourke, Mrs. Morrison, Mr. Sullivan and to Augustin Olivieri, the bank's vault attendant. Exhibit 8-C was among the photos then in the booklet and each of the above four eyewitnesses chose 8-C as the robber (T.150).

Ouida Morrison identified two men at trial: After 15 seconds of hesitation, she indetified appellant in court (T.157-158). She also again identified the man

in 8-C as the man who robbed the bank (T.163).*

Charles Sullivan, the guard, made no identification. He testified that the robber took Mr. Sullivan's gun (T.201).

After the robber left, four men came into the bank with money in a paper bag. Mr. Sullivan directed them to the manager(T.204).

F.B.I. Agent Milton Ahlerich testified that he arrived at the bank after the robbery was over and he seized a "wadded up and torn" brown paper bag (T.209). He found the bag on a teller's counter, near a large amount of money(T.215).

Appellant objected to the government's offer of this bag in evidence, arguing that there was no connection between the empty, torn paper bag seized by Agent Ahlerich and the bag used in the robbery (T.214, 215). After expressing some hesitation, (T.214,215), the Court received the bag in evidence (T.216).

Ahlerich sent the bag to Washington, D.C., for fingerprint analysis.

Appellant objected to all potential fingerprint proof derived from the 'Ahlerich bag.' for the same reasons appellant had objected to the bag's coming into evidence.(T.231).**

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* It should be noted that 8-C was actually a surveillance photo of a black man in the process of robbing a Chemical Bank on June 12, 1972 (id.).

** At the close of the Government's case, when no additional testimony as to the chain of custody of the bag had been adduced, appellant moved to strike all testimony relating to the 'Ahlerich bag' as unconnected to the 'workingmen's bag'.The motion was denied (T.378).

Carl Collins, a fingerprint specialist employed by the F.B.I. in Washington, D.C., testified that two of the fingerprints on the 'Ahlerich' bag were those of appellant. He acknowledged that "there were other latent fingerprints on the bag" (T.256), and that these other prints might have belonged to persons other than appellant, but that these "other" prints were not, in his opinion, of good enough quality to use in making any comparisons.

Officer Maurice Vosges testified that on April 13, 1973, he seized a gun from appellant(T.278). It was conceded by the defense that this was Mr. Sullivan's gun (T.294).

At the stationhouse, appellant was given "advice", and, as at the suppression hearing, Officer Vosges did not recall appellant ever having been warned that anything he said might be used against him:

> That he had a right to remain silent and not answer any questions; he had a right to an attorney present during any questioning; he had -- that he, if he could not afford an attorney, one would be provided for him free of charge before any questioning.
>
> Q Any other rights that you recall?
>
> A That's all.
>
> (T.282)

After being given those warnings, appellant, according to Officer Vosges, stated that he had bought the gun on the street for $50 (T.283).

F.B.I. Agent James Murphy testified that on

May 31, 1973, he and Agent Cotton interrogated appellant "at Riker's Island"(T.316). Appellant's motion for a mistrial, based on the government's failure to comply with the Court's ruling (T.15) that Riker's Island was not to be referred to during the trial, was denied (T.317).

Agent Murphy identified his own handwritten statement of what he said appellant had said on May 31, 1973. He acknowledged that several of the details in that statement had initially been provided by him to appellant, rather than having originated with appellant.*

Prior to commencing the defense, appellant's counsel, outside of the hearing of the jury, indicated that he expected to offer only the testimony of one witness and two documents (T.379).

Eugene Coyle, supervisor of protection services for the bank, explained the errors which caused the suveillance film (which was received in evidence) to be blank (T.398-400).

The Matteawan Clinical Summary, described, supra, at pp.9-10, and reproduced in full in Appellant's Appendix, was received in evidence on the issue of voluntariness of appellant's statements (T.402).

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* Eg. the date of the robbery and the address of the bank (T.354); the fact of the brown paper bag (T.355); the fact that money had spilled on the ground (T.373).

A letter from the Warden of Clinton Correctional Facility, certifying that appellant was in Clinton from February 11, 1972, through November 8, 1972 (thus establishing that appellant could not be the same man as 8-C), was received in evidence (T. 382-3, 405).

After the defense rested, the prosecutor, in the presence of the jury, stated:

> I expected Mr. Berman to put in more witnesses.

(T. 406).

The Court criticized the prosecutor, but denied appellant's motion for a mistrial (T.407).

In his summation, in direct violation of the Court's ground rules (T.11), the prosecutor deliberately referred to appellant's pending state-court charges:

> The gun turned up in Mr. Hall's possession on May [sic] 13, 1973, when he was arrested by the New York City Police for menacing with a loaded gun. Finally, you have --
>
> MR. BERMAN: Your Honor, shall I take that up or after the summation?
>
> THE COURT: I believe we better deal with it right now.
>
> (At the side bar.)
>
> THE COURT: You know the problem.
>
> MR. SCHATTEN: I don't see any problem.
>
> THE COURT: I do. You described why he was arrested.

(T.449)

The Court rebuked the prosecutor, but denied appellant's motion for a mistrial (T.450).*

(9) The Jury Deliberations

The jurors, who sent the Court numerous notes throughout the trial and the deliberations, remained out on this one-count, one-defendant case for over eight hours over the course of two days. At one point, they even asked the Court for:

> ... a word of encouragement? We seem to be troubled reaching a decision.

(T.506)

On the afternoon of the first day of deliberations, a somewhat bizarre incident transpired:

> THE COURT: Mr. Higgins, the U.S. Marshal, has just told me something that I think counsel ought to hear.
> Mr. Higgins, go ahead.
>
> MR. HIGGINS: We were eating at the Attache Restaurant. We were finished eating, coming out. The female deputy was in the rear. I was holding the door for the ladies, as I was doing that I heard a couple of ladies mention that someone had yelled to them, "Show no mercy". I thought it was just a joke and then I heard two other jurors say it and then the heavy stout man on the jury said it was a black and a white guy.

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* Throughout the trial, the prosecutor had indulged in misstating the charge in the indictment(T.80), reading from a document not in evidence and criticizing defense counsel in front of the jury (T.129-131), purportedly attempting to refresh the recollection of a witness whose memory had not been exhausted and impeaching his own witness T.134-135), attempting to offer a hearsay document into evidence and arguing in front of the jury (T.164-167).

I went in and saw the white guy and a black guy at the bar. I don't know if the white guy said it, but I know the black guy said it before. I went to the bartender and said "Whoever pulls this stuff again, he is coming to the court with us."

I know at least four of the jurors must have heard it easy. The only thing he ever says is "Show no mercy". And that's all that happened, your Honor.

(T. 494-495)

The Court denied appellant's motion for a mistrial (T.494-495). The marshal had more details:

Mr. Higgins, can you tell me which jurors heard or were in a position to hear this?

MR. HIGGINS: Heavyset man, I don't know his number.

THE CLERK: Number 3.

MR. HIGGINS: One of the ladies --

THE COURT: Which one?

MR. HIGGINS: All I can remember is one of the ladies and a guy.

THE COURT: Which lady?

MR. HIGGINS: I don't know. I may be able to pick her out by sight.

(T. 498)

* * * *

MR. HIGGINS: I didn't hear the incident. I said I was holding the door for the ladies when they first came out of the restaurant. That's the first time I heard them say anything about the "show no mercy" incident.

THE COURT: Did you hear somebody say it?

MR. HIGGINS: No.

THE COURT: Somebody on the jury told you this?

MR. HIGGINS: Right.

(T.500)

Appellant stated his position:

> MR. BERMAN: My position is as we now understand the circumstances I think it is worse because it is no longer a possibility that the jurors ignored what the man said, they found it at least important enough to talk about it among themselves. Now we know from the marshal some jurors were talking about it.
>
> THE COURT: I understand. What are you reommending I do?
>
> MR. BERMAN: My position is the same. A mistrial is in order.
>
> THE COURT: I know, but I am not going to grant you that motion. Do you want me to do anything else?
>
> MR. BERMAN: I wouldn't want their attention called to it.

(T.501)

The jurors were called in and the following transpired:

> THE COURT: Mrs. Martello, ladies and gentlemen, I am sorry for this interruption but something came to my attention. After thinking about it, I thought perhaps I better make sure that it is cleared up.
>
> I understand from the marshal who was with you at lunch that one or perhaps more than one of you mentioned to him that during lunch you had heard a bystander make some kind of a comment.
>
> I just want to be perfectly clear that, assuming this happened, that none of you have any doubts about your ability to continue to act without any bias to act impartially and fairly.
>
> Does anybody have any doubts as a result of what happened at lunch, I don't know, really, what happened.
>
> JUROR NO.8: I didn't hear it.

THE COURT: I want to be clear about this. Does anybody have any doubts?

I thought I just better make sure that anybody who wanted to unburden their soul could tell me.

Thank you very much. Sorry to bother you.

(T. 502-503)

The following day, the jury found appellant guilty as charged.

(10) The Sentence

After sentencing appellant provisionally for a three-month evaluation and report, pursuant to 18 U.S.C. §§4208(b) and (c), the Court on, July 3, 1974, sentenced appellant to fifteen years imprisonment.

ARGUMENT

POINT I

THE SEARCH AND SEIZURE OF THE GUN WAS ILLEGAL, BECAUSE THE OFFICERS HAD NEITHER PROBABLE CAUSE CAUSE TO BELIEVE THAT APPELLANT HAD A GUN, NOR A REASONABLE BELIEF THAT THEY SHOULD FEAR FOR THEIR SAFETY.*

A man named Dancey did no more than say to a group of police officers that appellant had a gun. Dancey did not say that he himself had seen the

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* The facts relating to the seizure of the gun have been set forth in detail at pp.3 through 6, supra.

gun. Dancey, as the Court found, was not a paid police informant, nor had he had any prior dealings with the police.

Since there was no showing that Dancey was a previously reliable informant, and since Dancey had never told the officers how he knew that appellant had a gun, it is clear that the facts of this case fail to pass the two-pronged probable cause test of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Under the Aguilar-Spinelli test, if probable cause is to be derived from an informant's tip, the police must show the factual basis for their believing both (1) that the informant was reliable and (2) that his specific information would be reliable. Dancey and his tip obviously failed both elements of this test,and the Court below, quite properly, declined to find probable cause, Memorandum Opinion, supra., p. 8.

But, rather than suppressing the gun, the Court equated the fact-pattern in the instant case with the unique and unusual situation encountered by the Supreme Court in Adams v. Williams, 407 U.S. 143 (1972). In that unique situation in Adams, the Supreme Court held that the officers had a reasonable basis for fearing for their safety.

We submit that even if Officer Vosges' version were to be entirely believed, the facts of

this case cannot be compared to those in Adams, and the gun must be suppressed.

In Adams, a single police officer

> ...was alone, early in the morning... in a high-crime area.... At approximately 2:15 a.m. a person known to [the officer]... informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.
>
> [The officer] tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the [officer] reached into the car and removed a fully loaded revolver from Williams' waistband. The gun... was in precisely the place indicated by the informant.

Adams, supra, 407 U.S. at 144-145 (emphasis added).

The Supreme Court, in explaining its reasons for allowing the search in Adams, stressed several factors:

> (1) The informant was known to [the officer] personally and had provided him with information in the past.

Id. at 146 (emphasis added).

> (2) ...in a high-crime area at 2:15 in the morning.

Id. at 147.

> (3) ...Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen....

Id., at 148, (emphasis added).

> (4) ...the policeman's action in reaching to the spot where the gun was thought to be hidden....

Id., (emphasis added).

Comparing the appellant's case with Adams, it is clear that in the instant case:

(1) The episode herein happened at midday (12:50 p.m.), not at 2:15 in the morning.

(2) Officer Vosges had 3 other officers with him, while the officer in Adams was alone.

(3) There was no testimony that the luncheonette was in a high-crime area.

(4) Appellant was not in a car, so he could not rapidly flee, his movements could be easily seen, and he posed much less of a potential danger than the defendant in Adams.

(5) Dancey, unlike the informant in Adams, gave no information as to a specific spot where the gun could be found.

(6) The appellant was totally neutralized when the officers had pinned his arms, before the search even occurred.

(7) Most significantly, Dancey, unlike the informant in Adams, had never in the past provided the officer with any information.

Thus, not only was there an acknowledged absence of probable cause in the instant case, but there was also an absence of an unusual, late-night, lone-officer, man-in-vehicle Adams situation which might reasonably justify an officer in fearing for his safety.

The gun must be suppressed and the indictment dismissed.

POINT II

THE FAILURE OF THE OFFICERS TO WARN APPELLANT, PRIOR TO TAKING HIS 'STATIONHOUSE' STATEMENT, THAT ANYTHING HE SAID COULD BE USED AGAINST HIM, VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS AND RENDERED THE STATEMENT INADMISSIBLE.*

Officer Vosges gave the exact same testimony each time he testified as to the rights advice given to appellant in the stationhouse. And each time, Officer Vosges failed to testify that appellant was ever told that anything he said could be used against him at trial:

(1) State-Court Suppression Hearing :

> He has a right to remain silent, he had the right to an attorney before he answered questions, any questions by the police department, if he could not afford an attorney one would be appointed for him.
>
> (Minutes of People v. Morris Hall, Indictment No. 2049/73, Supreme Court, New York County, January 17, 1974, p.8)

(2) Federal Court Suppression Hearing:

> He was advised of the right to remain silent before any questions were given to him by the police department without an attorney, if he couldn't afford an attorney one would be provided for him.
>
> (H.63)

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* The facts relating to the 'stationhouse' statement have been set forth in detail at pp.7 through 9 and 27, supra.

(3) The Trial Below:

That he had a right to remain silent and not answer any questions; he had a right to an attorney present during any questioning; he had -- that he, if he could not afford an attorney, one would be provided for him free of charge before any questioning.

Q Any other rights that you recall?

A That's all.

(T.282)

Officer Vosges' testimony compels the exclusive conclusion that at the stationhouse, appellant was never warned that anything he said could be used against him.* That warning is the essence of the Fifth Amendment right not to be a witness against oneself, and is the central pillar of the Miranda warnings** and of the reasoning behind the Miranda case.***

This Court cannot but find that, on the record below, appellant was questioned, in custody, in a stationhouse, after his arrest, and without being advised that anything he said could be used against him. That statement must be

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* This Court must reject the shabby attempt by the prosecutor, at the suppression hearing below, to lead Officer Vosges into adopting the language of an F.B.I. form from which the prosecutor was reading (H.97-100).

** Cf., the warning of the right to counsel present during the immediate interrogation, which this Court has held not be essential among the Miranda warnings. United States v. Diggs, 497 F.2d 391, 392-393 (2d Cir. 1974); United States v. Floyd, 496 F.2d 982, 988-989 (2d Cir. 1974).

*** Miranda v. Arizona, 384 U.S. 436(1966).

suppressed and a new trial ordered.*

POINT III

THE RIKER'S ISLAND INTERROGATION OF APPELLANT, IN A JAIL, WHILE THE INSTANT CASE AND A RELATED STATE-COURT CASE WERE PENDING, AND WITHOUT ATTEMPTING TO CONTACT HIS STATE-COURT ATTORNEYS OR TO PROMPTLY ARRAIGN APPELLANT AND APPOINT COUNSEL ON THE INSTANT CASE, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS AND UNDER MASSIAH v. UNITED STATES, 377 U.S. 201(1964).**

Once a criminal prosecution has been initiated, i.e. when an inquiry ceases to be merely a police matter and becomes an actual court case (with the filing of an indictment or a complaint), the accused acquires certain additional rights. He is entitled to a speedy trial. United States v. Marion, 404 U.S. 307(1971). Law enforcement authorities are prohibited from placing him in a line-up unless his counsel is notified and is given an opportunity to be present. Kirby v. Illinois, 406 U.S. 682(1972). And the authorities are prohibited from attempting to question him without first notifying his attorney and allowing the attorney to be present.

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* Of course, if this Court accepts our argument in POINT I, supra, and suppresses the gun, there is no question that the 'stationhouse' statement, made in direct response to a question about that same, just-seized gun, must be suppressed as the illegal fruit of that seizure. Wong Sun v. United States, 371 U.S. 471(1963).

** The facts relating to the 'Riker's Island' statement have been set forth in detail at pp. 10 through 13, supra.

Massiah v. United States, 377 U.S. 201(1964). United States ex rel. Lopez v. Zelker, 344 F.Supp. 1050 (S.D.N.Y., 1972).

Although prior to the initiation of a criminal prosecution, a properly warned suspect may waive his rights and consent to custodial interrogation without counsel present (Miranda, supra), once an indictment or a complaint has been filed, the accused must be promptly arraigned* and counsel appointed** and counsel must be notified of the opportunity to be present at any questioning before there can be any waiver of rights. Lopez v. Zelker, supra, at 1054. The absolute requirement of counsel, before there can be any waiver in post-indictment or post-complaint questioning by law enforcement authorities , is to be enforced all the more vigorously when the authorities want to question a defendant who is in jail.

In the instant case, on May 31, 1973, appellant was questioned about the instant case while he was in jail, without counsel, while the instant case had already been pending for a month since the filing of the complaint. He was interrogated by Agent Murphy, who certainly was aware of the complaint, since he himself had sworn to it before the magistrate. Murphy

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* Mallory v. United States, 354 U.S. 449(1957); McNabb v. United States, 318 U.S. 332(1943); Fed. R. Crim. Proc., Rules 4 and 5.

** If the defendant is indigent.

never advised appellant of the existence of the Federal complaint.

Appellant already had been assigned counsel on his state-court gun case, arising out of the very same gun, which had been taken from the bank guard. Murphy knew about the pending state-court gun case, but made no attempt to contact appellant's counsel on that case.* The only reason appellant did not yet have counsel on the Federal complaint was the government's failure to promptly arraign him.

This Court recently had before it the case of a defendant who:

> ... had been in West Street for some 40 days on the robbery charge alleged in the complaint ... Though entitled to counsel promptly after his removal here on the charge made in the complaint, Kirby v. Illinois, 406 U.S. 682, 688-89(1972), he was kept in custody without counsel and no effort was made to have counsel assigned to him.
>
> United States v. James, 493 F.2d 323, 325 (2d Cir. 1974), emphasis added.

This Court then gave a clear warning that such a procedure must not be tolerated:

> We view the failure to have counsel assigned to James during the some forty days he spent at West Street and what occurred when he was brought from West Street and taken before the Grand Jury with concern and disapproval, and we caution against repitition of such conduct.
>
> James, supra, 493 F.2d at 326, n.4.

* Murphy admitted that there was no urgency in seeing appellant on that particular day (H.120)

With regard to appellant, the Court below properly noted that:

> What it comes down to is if he had been arraigned [on the complaint] when he should have been, he would have had the right to have counsel when he was interviewed on May 31st.....
>
> (Minutes of 3/18/74, p.7)

In denying appellant's motion to suppress, the Court made a distinction between a pending complaint and a pending indictment. Memorandum Opinion, supra, at pp. 13-14. This Court, however, in James, supra, clearly rejected any distinction between an indictment and a complaint on the question of the rights to speedy arraignment and counsel.

The Court below also believed that a Miranda waiver was dispositive. Memorandum Opinion, supra, pp.13-14. But a Miranda-type waiver, in the absence of counsel, is not sufficient in a Massiah situation:

> First, assuming the Massiah protection may be waived, which is still a debatable question, the casual and relatively perfunctory invitation to a Miranda-style waiver is insufficient. When an indictment has come down, riveting tightly the critical right to counsel, a waiver of the right requires the clearest and most explicit explanation and understanding of what is being given up. There is no longer the possibility- and the law enforcement justification- that a mere suspect may win his freedom on the spot by 'clearing up a few things' ....Even in the courtroom where an impartial judicial officer is presumably impelled by no purpose but fairness, that officer must counsel with care and advise against the likely folly of a layman's proceeding without a lawyer. Von Moltke v. Gillies, 332 U.S. 708 (1948). We cannot settle for less where the waiver

> has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody.
>
> Lopez, supra, 344 F.Supp. at 1054.

Here, as in Lopez, appellant was not informed that a complaint had already been filed and that a criminal prosecution had, thus, already been initiated. Murphy concealed this from appellant. In such a Massiah context, with Murphy's deception and with the failure to arraign appellant*, a simple Miranda waiver cannot be held valid.** Once the complaint was filed, "adversary judicial proceedings" had been initiated against appellant and his right to counsel attached. Kirby, supra, 406 U.S., at 688: United States v. Masullo, 489 F.2d. 217,222(2d. Cir. 1973). The government which concealed the adversary nature of the proceedings by concealing from appellant the fact that the complaint had been filed and by failing to arraign him, cannot now claim that appellant knowingly waived his rights. The 'Riker's Island' statement must

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* Appellant was never arraigned on this case until September 17, 1973.

** Cf., United States v. Diggs, supra, 497 F.2d 391, 394, n.3. [absence of pending prosecution, distinguished from Lopez situation]; United States v. Barone, 467 F.2d 247(2d Cir.1972) [defendant questioned in his own home, telephoned his lawyer before making any admissions, Massiah distinguished]; United States v. Masullo, 489 F.2d 217,222(2d Cir. 1973)[no indictment or complaint filed, Massiah distinguished]; United States v. Ramirez, 482 F.2d 807, 815(2d Cir. 1973)[no indictment or complaint filed, Massiah distinguished].

be suppressed and a new trial ordered.

POINT IV

THE IDENTIFICATION TESTIMONY OF MRS. O'ROURKE AND MRS. MORRISON SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE GOVERNMENT'S FAILURE TO PRODUCE, OR RECONSTRUCT THE TWO JANUARY, 1973, PHOTO SPREADS DEPRIVED APPELLANT OF A FAIR HEARING ON THE ISSUE OF POSSIBLE TAINT. MOREOVER, MRS. MORRISON SHOULD NOT HAVE BEEN ALLOWED TO MAKE AN IN-COURT IDENTIFICATION AFTER THE F.B.I AGENTS IMPROPERLY REINFORCED HER EARLIER SELECTION OF APPELLANT'S PHOTOGRAPH. *

In United States v. Fernandez, 456 F.2d 638 (2d. Cir. 1972), a bank was robbed by a light-skinned black-man with an Afro haircut**. Fernandez was a light-skinned black man with an Afro haircut. On January 25, 1971, F.B.I. agents showed bank employees an array of five photos, only one of which was of a light-skinned black with an Afro. None of the employees made an identification from the January 25 array.

On March 2, 1971, the F.B.I. agents in Fernandez showed the bank employees an array of six other photos, again only one of which portrayed a light-skinned black with an Afro, Fernandez. Two of the bank employees chose

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* The facts relating to the identifiction testimony have been set forth in detail at pp.14 through 17, supra.

** There were three other participants, but it was the light-skinned, Afro-haired robber whom the government claimed was Fernandez.

this photo of Fernandez as the bank robber, and they subsequently identified him at trial.

This Court, in Fernandez, reversed the judgment and remanded for a new trial, stating as part of the reasoning that:

> Indeed, the very fact that the witnesses had once rejected a black with a light skin and an Afro might have subconsciously enhanced their willingness to accept one on the second go-around.
>
> Fernandez, supra, 456 F.2d at 642.

Turning now to the instant case, the bank had been robbed by a black man of appellant's general description.* On the day of the bank robbery(January 25), the bank employees were shown, by New York City police officers, a large number of photos. No record was ever kept of which photos were exhibited that day. We do not know if appellant's photo was among those photos.** All that is known is that none of the employees chose any of the January 25 photos.

On January 31, F.B.I. agents showed the four bank employees a booklet of about 25 photos. All four employees chose 8-C, a man who would fit appellant's general description, but who clearly is not appellant. Again, we do not know whether appellant's photo was among the other 24 photos shown and rejected on January 31, because the

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* However, Mrs. O'Rourke did describe the robber as 5' 10" tall, while appellant was 6' 1" tall. (T.125).

** Appellant had a criminal record in New York and his photo was certainly already in the New York files.

government did not preserve an accurate record of the contents of the booklet at that time.

Finally, on April 27, the F.B.I. showed the bank employees seven photos (Exhibits 1 through 7). Appellant's photo was No.6. An examination of these seven photos reveals similarities between No. , No.3, No.6, and also 8-C.* Mrs. O'Rourke chose No.3 as her first choice, and, when asked if she recognized any others, also picked No.6. Mrs. Morrison picked No.6, and this choice by her was immediately tacitly reinforced by the F.B.I. agents:

> Q Has anybody told you whether or not No.6 is the person who robbed the bank?
>
> A I think so.
>
> Q Who was that?
>
> A The FBI.
>
> Q They told you that No.6 was the person who robbed the bank?
>
> A Well,not -- I wouldn't say, you know, yes, they said, yes, that is the one I picked out according to the picture but --
>
> Q What is your best recollection of what they said, not their exact words, but what you can remember?
>
> A I could see by the way they looked when I pointed the picture out.
>
> (T. 67-68)

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* Nos. 2, 4, 5 and 7 do not fit the general description of appellant: No.2 is too young; No,4 has very short hair; No.5 has a long Afro; No.7 is much too old.

The Court noted that:

> The agents may have indicated tacit pleasure at Mrs. Morrison's April identification, but such identification clearly came after Mrs. Morrison made that identification.

Memorandum Opinion, supra, p.3.

It is indeed very possible, to borrow this Court's language in Fernandez, supra, that the obvious similarity between 8-C and the actual robber*, and the fact that Mrs. O'Rourke and Mrs. Morrison had already chosen 8-C, and the general similarity between 8-C and Nos. 1, 3, and 6, "might have subconsciously enhanced their willingness to accept one [of the 1,3,6, group] on the second go-around." 456 F.2d at 642.

Moreover, the failure of the police, the F.B.I. and the government to preserve records of which photos had been in the January 25 and January 31 spreads** deprived appellant of a full and fair hearing on the Simmons issue, thereby denying him due process of law. In addition, the failure to preserve such records, which might have shown that appellant's photo was among those

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* A similarity so great that all four bank employees positively identified 8-C as the robber only 6 days after the robbery.

** The Court noted that:

> As between the parties, the government has the only access to the information we seek.

Memorandum Opinion, supra, p.6.

rejected in the January 25 and January 31 spreads, deprived appellant of potentially exculpatory material. Brady v. Maryland, 373 U.S. 83(1963); United States v. Fernandez, ____F.2d ____, slip.op. 281, 288 (2d Cir. November 6, 1974).

Finally, it is clear that the Court erred in not seeing the danger inherent in the FBI agents' tacit reinforcement of Mrs. Morrison's choice of No.6 on April 27. Although such improper reinforcement did come after Mrs. Morrison picked out No.6, itcame before she made her in-court identification of appellant, and it obviously tainted that in-court identification. When the agents effectively told her that she had made the right choice in picking appellant's photo, they were implicitly and impermissibly suggesting that if she were to see appellant again she should identify him again.

It was the plainest of errors to let Mrs. Morrison make an in-court identification. She was the only black eye-witness, and her in-court identification of appellant cannot be dismissed as a harmless error.

The judgment must be reversed and a new trial ordered.

POINT V

THE COURT, WHICH WAS AWARE OF APPELLANT'S PRIOR CONFINEMENT IN A MENTAL HOSPITAL AS A PSYCHOTIC, PARANOID SCHIZOPHRENIC, ERRED IN NOT ORDERING A PSYCHIATRIC EXAMINATION OF APPELLANT AFTER IT LEARNED THAT APPELLANT WAS BEING BROUGHT TO TRIAL EACH DAY FROM THE PSYCHIATRIC WARD OF RIKER'S ISLAND

HOSPITAL AND THAT HE WAS NOT COMMUNICATING WITH HIS ATTORNEY.*

Appellant's counsel, who had been appointed by the Court only one week prior to the suppression hearing, placed in evidence at that hearing the Clinical Summary report on appellant's December 10, 1971, through February 8, 1972, confinement in the Matteawan State Hospital for the Criminally Insane.** At the time of the pre-trial hearing, appellant's counsel did not raise the issue of appellant's competence to stand trial; the Matteawan report was offered on the issue of appellant's capacity to voluntarily waive his rights at the time of his May 31, 1973, 'Riker's Island' statement.

The Matteawan report reveals that appellant had been confined in Matteawan because he had deteriorated to the point of psychosis and was diagnosed as a paranoid schizophrenic.

On the first day of trial, before a jury was chosen, appellant's counsel informed the Court that he had just learned that appellant had recently been "transferred to the psychiatric ward at Riker's" (T.33).

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* The facts relating to appellant's competence to stand trial have been set forth in detail at pp. 9-11 and 18 through 24, supra.

** The entire Matteawan Clinical Summary report is reproduced in Appellant's Appendix as Item E.

On the third day of trial, appellant's counsel informed the Court that he could no longer proceed because appellant was no longer communicating with him at all. Appellant was then in handcuffs and leg irons, his belt removed, his shirt and pants were open, and he appeared to be generally dissheveled.

The Court had before it a letter from a New York City Correction Department "referring physician," stating that appellant was "Okay to go to court psychiatrically" (T.170-173).

There was no explanation of why appellant was being held in a psychiatric ward. Appellant's counsel stated that he was not in a position to know whether or not appellant was competent to stand trial, and requested the Court that:

> under the circumstances a Court appointed physician -- that is, a psychiatrist -- should examine Mr. Hall.... on the question of his present state of mind ....
>
> (T. 181, 191)

This request was denied.

There is no indication in the record that the "referring physician" at Rikers Island was a qualified psychiatrist. Title 18 U.S.C. §4244 specifically provides that a competency examination be made by "at least one qualified psychiatrist." Moreover, the mere conclusion in the Riker's Island report, untested by cross-examination, that appellant was "Okay to go to court psychiatrically",

written by a City prison doctor, cannot be automatically equated with a qualified psychiatrist's finding that, by federal standards, one is competent to participate with his counsel in the defense at a federal trial. For all we know on this record, the Riker's doctor might have believed that appellant was "Okay" enough to attend no more than a state-court calendar appearance. The minimal Riker's report referred to by the Court cannot satisfy §4244, because there is no showing that the doctor was a qualified psychiatrist and there is no indication of the standards he applied.

Section §4244 requires the court, if the request is made at any time before sentence, to order an examination by a qualified psychiatrist, as long as the request is not clearly frivolous. United States v. McEachern, 465 F.2d 833, 838 (5th Cir. 1972); United States v. Pogany, 465 F.2d 72 (3rd Cir. 1972); United States v. Irvin, 450 F.2d 968 (9th Cir. 1971) Given appellant's history of prior mental confinement and the fact of his psychiatric confinement during the trial, as well as his non-communication with his attorney, it certainly cannot be said that appellant's counsel's request was frivolous. A reading of the colloquy in Irvin, supra, 450 F.2d at pp. 968-969, for example, will demonstrate just how much more serious appellant's claim was. In Irvin, the defendant had no history of psychiatric problems, was not being confined in a psychiatric ward at the time of trial, and was able to intelligently

answer the court's questions. His counsel merely complained of a failure to communicate with her. The trial court denied a §4244 examination and the Ninth Circuit reversed and remanded for a new trial, to be preceded by a §4244 examination. 450 F.2d at 970.

This same relief is certainly required in the instant case.

POINT VI

THE INFERENCE THAT THE MONEY-FILLED BAG SEEN BY MRS. O'ROURKE WAS THE SAME BAG AS THE EMPTY, "WADDED UP AND TORN" PAPER BAG FOUND BY FBI AGENT AHLERICH WAS IMPERMISSIBLE BECAUSE OF THE BROKERN CHAIN OF IDENTIFICATION AND THE DIFFERENT CONDITION OF THE TWO BAGS.*

Mrs. O'Rourke established that the robber left the bank with a paper bag filled with money. She also testified that some time after the robbery some workingmen brought into the bank a paper bag conatining some of the stolen money, and that this bag was placed on her counter.

Agent Ahlerich testified that he seized an empty, "wadded up and torn" paper bag on a teller's counter, near a large amount of money. The 'Ahlerich bag' bore appellant's fingerprint.

We would agree that a jury could properly infer that the bag which left the bank (the 'robber's bag'), filled with money, in the custody of the robber, was indeed the same

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* The facts relating to the chain of custody issue have been set forth in detail at pp. 25-26, supra.

bag as the bag which the workingmen brought in to the bank, containing some of the loot (the 'workingmen's bag'). This is because (1) there wasno difference in the condition of these two bags, and (2) the fact of the same money being in both bags was the common factor which forged the necessary link between them.

> It is generally recognized that tangible objects become admissible in evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused and the criminal offense.
>
> Gass v. United States, 416 F.2d 767,770 (D.C. Cir.1969)*

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* In Novak v. District of Columbia, 160 F.2d 588(D.C. Cir. 1947), a police officer took the defendant's urine sample, placed it in a bottle, and placed his own initials and the defendant's name on the bottle. At trial, both the lab report and the chemist who testified said that the urine analysis had been done upon a sample which came from a bottle which had the defendant's name on it. The Court of Appeals reversed, ruling that the analysis report and the chemist's testimony were inadmissible because "there is missing a necessary link in the chain of identification." 160 F.2d at 589.

In United States v. Panczko, 353 F.2d 676(7th Cir. 1965), a boy testified that he found some keys,allegedly thrown away by the defendant, at the scene,and gave them to an unidentified policeman. An officer, named Esposito, testified that an unidentified boy gave him some keys "similar" to the ones in evidence. The Court of Appeals reversed on other grounds, but rules that "in the retrial of this case the handling of the keys allegedly thrown away by defendant should be traced by an unbroken chain of evidence." 353 F.2d at 679.

Cf., U.S. v. Campopiano, 446 F.2d 869, 870 (2d Cir. 1971), vacated on other grounds, 408 U.S. 918.

However, the proper connection was never forged between the 'workingmen's bag' and the'Ahlerich bag', and it was error to permit the jury to do so: (1)They were different in condition : The 'workingmen's bag' was untorn and contained money from the robbery; the 'Ahlerich bag' was wadded up and torn and was empty. (2) Although Ahlerich found his bag near a pile of money, there was no proof that that pile of money was part of the returned loot from the robbery. Thus, there was no common factor to forge the necessary link between the two. It was permissible for the jury to find that the 'workingmen's bag' was linked to the crime and that the 'Ahlerich bag' was linked to appellant. But there was no proper basis for inferring a link between those two links. The chain was therefore incomplete and the judgment must be reversed and a new trial ordered.

POINT VII

THE TOTALITY OF PROSECUTORIAL INDISCRETIONS MERITS A REVERSAL OF THE JUDGMENT HEREIN.*

The Court had ruled, at the outset of the trial, that appellant's place of confinement on May 31, 1973, should be referred to as 'a jail', rather than as 'Riker's Island', and that all witnesses should be prepared to avoid any mention of Riker's Island in their testimony (T.15).

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* The facts relating to the prosecutor's conduct have been set forth in detail at pp. 28 through 30, supra.

The purpose of the ruling was to avoid any suggestion that appellant had state-court charges pending against him. See, United States v. Harrington, 490 F.2d 487(2d Cir. 1973).

Nevertheless, Agent Murphy, who was not only a prosecution witness, but a seasoned F.B.I. agent and who had prior experience as a witness, testified, on direct examination, that he interrogated appellant "at Riker's Island"(T.316).

After the defense rested, the prosecutor, in the presence of the jury, stated that he "expected Mr. Berman to put in more witnesses"(T.406).

In his summation, again in violation of the specific ground rules set by the Court(T.11), the prosecutor deliberately referred to appellant's state-court charges of possession of a loaded weapon and menacing(T.449).

The Court, after each of the above prosecutorial indiscretions, denied appellant's motion for a mistrial.

This was a close case. The jury was cut for two days and sent the Court numerous notes, including one which expressed trouble reaching a decision and asked for encouragement(T.506). We submit that this Court must evaluate the totality of the prosecutorial indiscretions in the context of such a close case. We do not enjoy making this point, but appellant, who has been sentenced to 15 years imprisonment, had a right to a trial free from these cheap attempts to slur his character and to demean his defense.*

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* See generally, United States v. Gonzalez, 488 F.2d 833(2d Cir. 1973); United States v. Drummond, 481 F.2d 62(2d Cir.

The judgment should be reversed and a new trial ordered.

POINT VIII

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL WHEN, WHILE AT LUNCH DURING DELIBERATIONS, SEVERAL JURORS HEARD A MAN YELL AT THEM 'SHOW NO MERCY'. *

The rule is clear that private communications between outsiders and jurors, relative to the case on trial, are absolutely forbidden, and that such prohbitied communications are presumed to be prejudicial. Mattox v. United States, 146 U.S. 140(1892). See also, United States v. Panczko, 353 F.2d 676, 678(7th Cir. 1965). In the instant case, an unknown black person yelled to the juors as they lunched during deliberations,"Show no mercy."

In United States v. Betner, 489 F.2d 116(5th Cir. 1974), the Fifth Circuit reversed a conviction where the United States Attorney had fraternized with the jurors for one and one-half hours, although it was clear he had not discussed the case with them. The Court of Appeals, holding that the trial court had the duty to ascertain whether the defendant

*(cont'd from preceding page)
1973); United States v. Fernandez, 480 F.2d 726(2d Cir. 1973); United States v. Miller, 478 F.2d 1315(2d Cir. 1973); United States v. Grunberger, 431 F.2d 1062(2d Cir. 1970).

* The facts relating to the jury episode have been set forth in detail at pp. 30 through 33, supra.

had been prejudiced by the alleged misconduct, set up the following procedure to that end:

> 1) The trial judge must ascertain if the misconduct actually occurred.
>
> 2) If the trial judge finds that the misconduct occurred, he must find whether it was prejudicial.
>
> 3) Unless the trial judge finds that the alleged misconduct was not prejudicial, he must grant the motion for a new trial.
>
> 4) If the trial judge concludes that the misconduct was clearly not prejudicial, he must spell out his finding with adequate specificity for meaningful appellate review.
>
> United States v. Betner, supra, 489 F.2d at 119.

This procedure was clearly not followed in the case at bar. As soon as appellant's counsel was informed of the undisputed misconduct, he moved for a mistrial. The trial judge denied that motion, and then asked counsel what he recommended. Counsel adamantly opposed any questioning of the jurors, fearing that such questioning of the jurors might draw undue attention to the incident and further underscore it in the jurors' minds. Nonetheless, the trial judge then proceeded to raise the matter with the jurors, asking them collectively if they had any doubts about their ability "to continue to act without any bias to act impartially and fairly." The record reflects no audible answer by any jurors to the trial judge's question, although one juror asserted that he never heard the comment.

By this procedure, the incident was thus recalled to

the attention of those jurors who had initially heard it, and, worse still, it whetted the curiosity of those jurors who had not heard the comment. Furthermore, the judge did not make a clear finding of no prejudice, nor did he spell out such a finding with adequate specificity for meaningful appellate review.

This Court cannot now assess the prejudice which may have occurred.* This bizarre, unusual occurrence might have been the turning point in the "troubled" jury's rather lengthy deliberations, a jury which soon after this episode had to ask the Court for "a word of encouragement"(T.506). The Court, having failed to make a finding of no prejudice, and the record being barren of sufficient facts to now assess the prejudice of the incident to the defendant, this Court must reverse the conviction and remand for a new trial.

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* The jury, which was substantially composed of white persons, may have been highly influenced by a black man urging them to show no mercy to a black defendant. Those members of the jury who might not have initially heard the comment might have then asked their fellow jurors to describe the incident.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. IN THE ALTERNATIVE, A NEW TRIAL SHOULD BE ORDERED, PRECEDED BY A COMPETENCY HEARING.

Respectfully submitted,

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Counsel for appellant wishes to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.